

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

Supreme Court, U. S.

FILED

JUL 26 1978

RODAK, JR., CLERK

No. 77-6431

ABDIEL CABAN,

Appellant,

v.

KAZIM MOHAMMED and MARIA MOHAMMED,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

**BRIEF AMICUS CURIAE OF THE NEW YORK STATE
ATTORNEY GENERAL IN SUPPORT OF APPELLEES**

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
*Attorney Pro Se for the
Constitutionality of DRL
§ 111-111-a*
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3372

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

IRWIN M. STRUM
Assistant Attorney General
in charge of Trusts and
Estates Bureau

WARREN M. GOIDEL
Assistant Attorney General
in charge of Charitable
Foundations Bureau

NEIL S. SOLON
Assistant Attorney General
of Counsel

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Opinions Below

The opinion of the Court of Appeals is reported at 43 N Y 2d 708, 401 N.Y.S. 2d 208, 372 NE2d 42 (1977). The opinion of the Appellate Division of the Supreme Court of the State of New York, Second Department is reported at 56 A D 2d 627, 391 N.Y.S. 2d 846. The opinion of the Surrogate's Court of Kings County is not reported and is set out at page 27 of the Appellant's Appendix.

Jurisdiction

The jurisdiction of this Court to hear this appeal is conferred by Title 28, United States Code, § 1257(2). This Court noted probable jurisdiction and leave to appeal *In Forma Pauperis* on May 15, 1978.

Statutes Involved

Domestic Relations Law § 111 and § 111-a, 14 McKinney's Consolidated Laws of New York, 289-291, Cumulative Annual Pocket Part for use in 1977-1978, 20-21.

§ 111 is reproduced at page 5 of appellant's brief.

§ 111-a. Notice in certain proceedings to fathers of children born out-of-wedlock

1. Notwithstanding any inconsistent provisions of this or any other law, and in addition to the notice requirements of any law pertaining to persons other than those specified in subdivision two of this section, notice as provided herein shall be given to the persons specified in subdivision two of this section of any adoption proceeding initiated pursuant to this article or of any proceeding initiated pursuant to section one hundred fifteen-b relating to the revocation of an adoption consent, when such proceeding involves a child born out-of-wedlock provided, however, that such notice shall not be required to be given to any person who previously has been given notice of any proceeding involving the child, pursuant to section three hundred eighty-four-c of the social services law, and provided further that notice in an adoption proceeding, pursuant to this section shall not be required to be given to any person who has previously received notice of any proceeding pursuant to section one hundred fifteen-b. In addition to such other requirements as may be ap-

plicable to the petition in any proceeding in which notice must be given pursuant to this section, the petition shall set forth the names and last known addresses of all persons required to be given notice of the proceeding, pursuant to this section, and there shall be shown by the petition or by affidavit or other proof satisfactory to the court that there are no persons other than those set forth in the petition who are entitled to notice.

2. Persons entitled to notice, pursuant to subdivision one of this section, shall include:

(a) any person adjudicated by a court in this state to be the father of the child;

(b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, pursuant to section three hundred seventy-two-c of the social services law;

(c) any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to section three hundred seventy-two-c of the social services law;

(d) any person who is recorded on the child's birth certificate as the child's father;

(e) any person who is openly living with the child and the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father;

(f) any person who has been identified as the child's father by the mother in written, sworn statement; and

(g) any person who was married to the child's mother within six months subsequent to the birth of the child

and prior to the execution of a surrender instrument or the initiation of a proceeding pursuant to section three hundred eighty-four-b of the social services law.

3. The sole purpose of notice under this section shall be to enable the person served pursuant to subdivision two to present evidence to the court relevant to the best interests of the child.

4. Notice under this section shall be given at least twenty days prior to the proceeding by delivery of a copy of the petition and notice to the person. Upon a showing to the court by affidavit or otherwise, on or before the date of the proceeding or within such further time as the court may allow, that personal service cannot be effected at the person's last known address with reasonable effort, notice may be given, without prior court order therefor, at least twenty days prior to the proceeding by registered or certified mail directed to the person's last known address or, where the person has filed a notice of intent to claim paternity, pursuant to section three hundred seventy-two-c of the social services law, to the address last entered therein. Notice by publication shall not be required to be given to a person entitled to notice pursuant to the provisions of this section.

5. A person may waive his right to notice under this section by written instrument subscribed by him and acknowledged or proved in the manner required for the execution of a surrender instrument pursuant to section three hundred eighty-four of the social services law.

6. The notice given to persons pursuant to this section shall inform them of the time, date, place and purpose of the proceeding and shall also apprise such persons that their failure to appear shall constitute a denial of their interest in the child which denial may

result, without further notice in the adoption or other disposition of the custody of the child.

7. No order of adoption and no order of the court pursuant to section one hundred fifteen-b shall be vacated, annulled or reversed upon the application of any person who was properly served with notice in accordance with this section but failed to appear, or who waived notice pursuant to subdivision five. Nor shall any order of adoption be vacated, annulled or reversed upon the application of any person who was properly served with notice in accordance with this section in any previous proceeding pursuant to section one hundred fifteen-b in which the court determined that the best interests of the child would be served by adoption of the child by the adoptive parents.

Question Presented

Does DRL §§ 111-111-a meet the Constitutional requirements of due process and equal protection as defined by this Court?

The Attorney General of the State of New York submits that the statute is constitutional as found by the New York Court of Appeals and further that the statute, as amended after the initiation of the instant proceeding, bears more than a rational relation to the constitutionally permissible objective of protecting the interests of all citizens of New York with regard to consent for the adoption of minors born out of wedlock.

Statement of the Case

The appellant seeks to declare unconstitutional section 111 of the Domestic Relations Law of the State of New York.

Appellant was cited and interposed objections to the petition for adoption of David Andrew C. and Denise C. by Kazim and Maria Mohammed, the natural mother of the children and her husband, in Surrogate's Court, Kings County. After a hearing on the petition and objections Surrogate Sobel issued four orders. Two orders dismissed the appellant's objections to the adoption and two orders approved the respective adoptions of David Andrew C. and Denise C.

The Appellate Division, Second Department, of the New York State Supreme Court affirmed the four orders of the Surrogate's Court in a single order.

The New York State Court of Appeals found appellant's constitutional claims lacking substantiality in view of that Court's decision overruling the challenge to the same section 111 of the Domestic Relations Law in *Mater of Malpica-Orsini*, 36 NY2d 568, 370 N.Y.S.2d 511, 331 N.E.2d 486, app. dsmd. *sub nom. Orsini v. Blasi*, 423 U.S. 1042 (1976) "for want of a substantial federal question." Two motions for reargument and rehearing were denied by orders of the New York Court of Appeals filed January 10, 1978 and February 14, 1978.

The Attorney General of the State of New York was not a party to the original determination in the Surrogate's Court, the Appellate Division or the Court of Appeals. The Attorney General of the State of New York is permitted to intervene as *amicus curiae* pursuant to Rule 42 of this Court and does so in support of the constitutionality of the statutes in question.

For the purpose of this appeal the Attorney General submits the following statement of facts. (Numbers in parentheses refer to transcript of proceedings in Record on Appeal; Court of Appeals.)

In 1968 Maria Mohammed entered into an out-of-wedlock relationship with appellant. Appellant was married at that

time but informally separated from his wife and two children for more than eight years (353).

In 1969 and 1971 Maria Mohammed gave birth to David Andrew and Denise respectively. Appellant did not pay the hospital bills for the delivery of either child. Appellant's name appears on the birth certificates of the children due to demands made upon him by Maria (85-86).

At no time did appellant formally acknowledge that he was the father of the children (74-75).

Appellant remained married to his lawful wife, Gloria Caban, however he had no arrangement as to his support of her or their two children by that marriage. At the hearing in Surrogate's Court appellant testified that he did not know whether his wife Gloria was employed nor did he care (388-393).

Appellant did not attempt to divorce his wife Gloria while he was living with Maria nor did he ask or offer to marry Maria (89-90).

Maria Mohammed was fully employed during her relationship with appellant except for three months following the birth of Denise. Maria paid all household expenses including the purchase of clothing, etc., for the children (75) (76-77) (85-86).

Appellant's contribution to Maria and the two children was \$30.00 a week for food. This \$30.00 was contributed by appellant for all four persons and Maria prepared all meals (76-77). After six months of no monetary contributions at all, physical and verbal abuse and lack of familial respect Maria left appellant taking her children with her (120).

Maria terminated her relations with appellant in December, 1973. She married Kazim Mohammed in January, 1974 (93-95).

In September, 1974 Maria's mother took the children to Puerto Rico to temporarily reside with her while Maria and her husband made plans to permanently resettle there (205-207). While the children were with their maternal grandmother Maria and her husband sent money on a bi-weekly basis to contribute to their support. On one occasion they personally visited with the children in Puerto Rico (208-210). Appellant was aware of the children being removed to Puerto Rico (352, 357) and neither protested nor sent money to assist in their support (106) (414-415). Appellant did not demand their return at any time. Appellant never sought to communicate with the maternal grandmother or the children while they were in Puerto Rico (413-416).

By September or October, 1975 appellant was divorced from his first wife Gloria and living with another woman and her children (402, 403, 435). Appellant consulted counsel in New York and then journeyed to Puerto Rico (416, 420). Appellant then saw the two children for the first time since July 8, 1974 (418) and decided they did not look as well as they should have (364) and without consulting local counsel (422) or the police and family court in Puerto Rico (421) he took the children and returned to New York with them where he secreted them from Maria (420). It should be noted that the trial court could not find even a scintilla of evidence supporting appellant's contention that Maria had abandoned the children (Appendix p. 30).

The Family Court returned custody of the children to Maria on November 25, 1975 (378).

Appellant married the woman he had been living with in December, 1975 (426).

The petition for adoption of the two children was filed by Maria and Kazim Mohammed in Surrogate's Court, Kings County on January 15, 1976 (Appendix p. 5).

The Attorney General of the State of New York respectfully submits that this Court, in the best interests of the

children presently before this Court, take note of appellant's affidavits in support of his motions to proceed *In Forma Pauperis* in the New York State Court of Appeals and in this Court.

Furthermore, appellant and supporters of his cause failed to apprise this Court that the house he purchased for the children was surrendered for a failure to meet financial responsibilities.

The Attorney General further submits that appellees, Maria and Kazim Mohammed, have borne the expenses of this litigation by themselves.

POINT I

New York State Domestic Relations Law §§ 111 and 111-a, as a matter of constitutional due process, afford appellant the fairest of statutory means to participate in adoption proceedings under this Court's mandates of *Stanley v. Illinois* and *Quilloin v. Walcott*.

The threshold question on this appeal is whether appellant, as a matter of constitutional due process and equal protection, is entitled to an absolute veto over the adoption of his alleged children absent a finding of his unfitness as a parent.

The case at bar involves the same constitutional claims which this Court found inadequate in *Quilloin v. Walcott*, — U.S. —, 54 L Ed 2d 511, 98 S. Ct. 549 (1978).

The statute construed by this Court in *Quilloin, supra*, i.e., Georgia Code Annotated § 74-403(3), provided that the consent of the natural mother alone suffices for purposes of adoption of her illegitimate children.

DRL § 111(3) provides that only the consent of the mother, whether adult or infant, of a child born out of

wedlock need be obtained in an adoption proceeding. DRL § 111-a, effective January 1, 1977, directs notice of an adoption proceeding to the putative father under certain circumstances, allowing the putative father an opportunity to be heard. Family Court Act §§ 517 and 522 permits a putative father to petition the courts of New York State to legitimate his child at any time during the lifetime of the putative father.

FCA § 522 and DRL § 111-a were made effective after the initiation of the instant proceeding, however, as this Court noted in *Quilloin, supra*, 54 L Ed 2d 518 fn. 12: “. . . appellant would not have received any greater protection under the new law than he was actually afforded by the trial court.”

Surrogate Sobel reached his decision in the case at bar after active participation of all parties including appellant, by applying the “best interests of the child” standard. The Surrogate was aware of all competing interests as evidenced by his thorough decision.

“*The prime objective of allowing a putative father to be heard is therefore not to determine the degree of his continued interest in the child but rather to determine the best interests of the child.*” Appendix p. 28 Decision of Surrogate Sobel. (emphasis added)

The Surrogate, confronted with serious controverted questions of fact, found that the adoption would keep the children in a family unit already in existence consisting of the natural mother and her husband. This result was desired by all except the appellant. The Surrogate’s decision is a careful analysis of all pertinent facts in this matter. As a trier-of-fact he found that there was “. . . *absolutely no evidence, credible or otherwise*, that the new marriage of the natural mother is other than solid or permanent; *and no evidence whatsoever that the children are not well cared for and healthy.* Nothing therefore justifies a denial

of the petition other than that the putative father professes that he loves the children and fervently desires that they continue to bear his name. This is not enough however sincerely motivated.” Appendix, p. 30 (emphasis added).

The Court of Appeals found appellant’s constitutional claims lacking substantiality in view of that Court’s decision in *Matter of Malpica-Orsini, supra*, 36 N Y 2d 568, app. dsmd. *sub nom. Orsini v. Blasi*, 423 U.S. 1042.

In *Malpica-Orsini* the New York State Court of Appeals was confronted with a similar constitutional challenge to DRL § 111. That Court held that the father of an illegitimate child is not denied due process in proceedings for a child’s adoption where, although the consent of the father is [was] made unnecessary by DRL § 111, the father was given notice of the petition for adoption and appeared by counsel and objected. The court held a hearing on the petition and determined that the proposed adoption by the man whom the natural mother had married was in the best interests of the child.

The decision is a broad analysis of the underlying and conflicting interests of parties to the adoption of out-of-wedlock children, see discussion, Point II, *infra*. As noted, this Court dismissed the appeal, in which the Attorney General of New York State, appeared in defense of the statute, “for want of a substantial federal question.”

Here, the attempt to create a due process challenge is singularly without merit. Appellant’s notification, opportunity to make his case and the finding of the Surrogate in the “best interests of the child” more than adequately protected appellant’s right and the rights of others to constitutional due process of law.

DRL §§ 111 and 111-a bear a rational relation to the constitutionally permissible objective of protecting the interests of all citizens of the State of New York with regard to consent for adoption of minors born out-of-wedlock.

Quilloin v. Walcott, supra; Zablocki v. Redhail, — U.S. — 54 L Ed 2d 619, 97 S. Ct. 673 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972).

This Court stated in *Quilloin*, 54 L Ed 2d 520:

"We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 53 L.Ed. 2d 14, 97 S. Ct. 2094 (1977) (Stewart, J. concurring). But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, was in the best interests of the child."

As previously stated Surrogate Sobel adjudicated the rights of parties to this proceeding under the "best interests of the child" standard. However this appeal diverges from the *Quilloin* case on only one issue of fact; the *alleged* participation of the appellant in the children's welfare.

Appellant contends that *Stanley* and *Quilloin* make the particularized finding that the father was an unfit parent. This, appellant advances, is a constitutional predicate for taking his children away.

In the instant case, appellant never obtained nor attempted to obtain legal custody of the children. Although he did have actual custody for various periods of time, this question of fact, was weighed as insufficient under the "best interests of the child" test by two New York State fact finding tribunals, in this complex, emotional custody proceeding. The court did not attempt to break up an existing family unit. The court placed the children in a home that they were already living in. That home consisted of the natural mother and furthermore the tribunals could find no credible evidence that the children were anything but healthy and happy in the existing family unit.

The Surrogate, as evidenced by his decision, also based much of his decision on the credibility of appellant's witnesses. These witnesses were personally before the Surrogate and their credibility was judged by one of New York's most experienced trial jurists.

The statute at bar permits active participation by all parties. The statute disallows absolute veto power by the putative father to enable the trial judge to discern the child's best interest only after all parties have advanced their cause. The trial judge must endeavor to place the child in a setting most conducive to acclimatizing these young people to a complex social environment. To allow the putative father absolute veto power over the adoption, or, in the alternative to set a mandate of parental unfitness as the sole guideline of custody is to place the rights of the putative father above the rights of the child. This result would undermine the sole purpose of the adoption process—the welfare of the child.

POINT II

New York State Domestic Relations Law §§ 111 and 111-a, as a matter of constitutional equal protection, afford appellant the fairest of statutory means to participate in adoption proceedings under this Court's mandates of *Stanley v. Illinois* and *Quilloin v. Walcott*.

As the New York State Court of Appeals stated in *Matter of Malpica-Orsini*, *supra*, 36 N Y 2d at 571, 370 N.Y.S. 2d at 517:

"In measuring appellant's claim of a denial of equal protection, it is necessary to consider various standards of review. It has been observed that there is hardly a law on the books that does not affect some people differently from others (see *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 60, 93 S.Ct. 1278, 36 L.Ed.2d 16 [concurring opn.]). Under traditional analysis, the equal protection clause does not deny to states the power to treat different classes of persons in different ways, but a classification must be reasonable, not arbitrary, and have a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike (*Reed v. Reed*, 404 U.S. 71, 75-76, 92 S.Ct. 251, 30 L.Ed. 2d 225; *Neale v. Hayduk*, 35 N Y 2d 182, 186, 359 N.Y.S. 2d 542, 544, 316 N.E.2d 861, 862). A State does not violate the guarantee merely because the classifications made by its laws are imperfect. (*Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491), and a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. (*McGowan v. Maryland*, 366 U.S. 420, 426, 81 S.Ct. 1101, 6 L.Ed.2d 393; *Matter of Dora 'HH' v. Lawrence*, 'II', 31 N Y 2d 154, 158, 335 N.Y.S. 2d 274, 276, 286 N.E.2d 717, 719)."

Quilloin, as a definitive interpretation of *Stanley*, establishes this Court's directive that a factual inquiry will be made into the relationship. According to *Quilloin* the father will only be given rights accruing to other parties if he can prove a substantial relationship *and* that continuing that relationship will be in the best interests of the children.

The record on this appeal is clear that appellant, although he did have a relationship with the children, did not have a relationship that in any way can be categorized as substantial. See Statement of the Case, *supra*. In fact, appellant's contributions to the relationship were not much more than Mr. Quilloin's. Appellant's brief makes continual reference to his devotion. *Amicus* respectfully submits that incessant repetition will not overcome a record that is almost devoid of meaningful support and contributions to a healthy environment for the children. See Statement of the Case, *supra*.

In *Quilloin*, *supra*, this Court dismissed appellant's claim of analogous standing with a divorced husband as insufficient, 54 L Ed 2d 520. In the case at bar we are not confronted with an irrebuttable presumption as in *Stanley*. We are confronted with a fact situation as devoid of paternal interest and care as in *Quilloin*.

This Court has recently tended to view illegitimates as a suspect classification. See: *Trimble v. Gordon*, 430 U.S. 762 (1977). The degree of scrutiny utilized by this Court in the aforementioned case, however, is inapplicable to the instant case. This Court has never viewed putative fathers as a discreet and insular minority invidiously discriminated against. Cf. *Reed v. Reed*, 404 US 71 (1971). The classification here is not gender based but rather an allocation of rights amongst participants of the relationship. As the record shows, the statute was applied for the protection of the illegitimate consequently the equal protection test here must be reviewed from the standpoint of the rational basis

test. Or, as previously quoted from the Court of Appeals decision in *Malpica-Orsini, supra*, is DRL §§ 111-111-a a reasonable classification, not arbitrary, having a fair and substantial relation to the object of the legislation. This Court in dismissing that appeal must be presumed to have approved the view of the Court of Appeals.

The following is excerpted from the Court of Appeals decision in that case (36 N Y 2d at 571-575):

"Adoption laws in the United States are founded upon broad humanitarian principles and the public policy involved in the statutes is one of beneficence (2 Am.Jur. 2d, Adoption, § 3). Embodied in our adoption statute is the fundamental social concept that the relationship of parent and child, with all the personal and property rights incident to it, may be established independently of blood ties, by operation of law, and that has been part of the public policy of this State since 1887 . . . In harmony with the legislative policy thus expressed, the adoption statute has been most liberally and beneficently applied.

Adoption is a means of establishing a real home for a child . . . 'Adoption has always had the dual function of giving children homes and homes children . . .

The emphasis is now on promoting the welfare of an otherwise homeless child. This change is partly the result of the increasing importance of psychiatry and psychology, which have revealed the role of a happy family life in producing well-adjusted citizens, and partly the inevitable response to a totally changed situation. Illegitimacy and family breakdown have become problems on an unprecedented scale in modern industrial societies. Never before have there been so many thousands of children for whom society finds each year that it must make some provisions . . . *the purpose of adoption is almost uniformly seen as promoting the welfare of children.*'

To require the consent of fathers of children born out of wedlock . . ., or even some of them, would have the overall effect of denying homes to the homeless and of depriving innocent children of the other blessings of adoption. The cruel and undeserved out-of-wedlock stigma would continue its visitations. At the very least, the worthy process of adoption would be severely impeded."

The Court of Appeals then considered serious procedural problems relevant to the case at bar:

"Great difficulty and expense would be encountered, in many instances, in locating the putative father to ascertain his willingness to comment. Frequently, he is unlocatable or even unknown. Paternity is denied more often than admitted. Some birth certificates set forth the names of the reputed fathers, others do not.

Couples considering adoptions will be dissuaded out of fear of subsequent annoyance and entanglements. A 1961 study in Florida of 500 independent adoptions showed that 16% of the couples who had direct contact with the natural parents reported subsequent harassment, compared with only 2% who had no contact. . . . The burden on charitable agencies will be oppressive. In independent placements, the baby is usually placed in his adoptive homes at four or five days of age, while the majority of agencies do not place children for several months after birth. . . . Early private placements are made for a variety of reasons, such as a desire to decrease the trauma of separation and an attempt to conceal the out-of-wedlock birth. It is unlikely that the consent of the natural father could be obtained at such an early time after birth, and married couples, if well advised, would not accept the child, if the father's consent was a legal requisite and not then available. Institutions such as

foundling homes which nurture the children for months could not afford to continue their maintenance, in itself not the most desirable, if fathers' consents are unobtainable and the wards therefore unplaceable. These philanthropic agencies would be reluctant to take infants for no one wants to bargain for trouble in an already tense situation. The drain on the public treasury would also be immeasurably greater in regard to infants placed in foster homes and institutions by public agencies.

Some of the ugliest disclosures of our time involve black marketing of children for adoption. One need not be a clairvoyant to predict that the grant to unwed fathers of the right to veto adoptions will provide a very fertile field for extortion. The vast majority of instances where paternity has been established arise out of filiation proceedings, compulsory in nature, and persons experienced in the field indicate that these legal steps are instigated for the most part by public authorities, anxious to protect the public purse. . . .

While it may appear, at first blush, that a father might wish to free himself of the burden of support, there will be many who will interpret it as a chance for revenge or an opportunity to recoup their 'losses'.

Marriages would be discouraged because of the reluctance of prospective husbands to involve themselves in a family situation where they might only be a foster parent and could not adopt the mother's offspring.

We should be mindful of the jeopardy to which existing adoptions would be subjected and the resulting chaos by an unadulterated declaration of unconstitutionality. Even if there be a holding of nonretroactivity, the welfare of children, placed in homes months ago, or longer, and awaiting the institution or completion of legal proceedings, would be seriously affected. The attendant trauma is unpleasant to envision.

Certainly, these facts demonstrate that the classification is reasonable, not arbitrary, and keeping in mind the paramount consideration of a child's welfare, the legislative action is justified." (citations omitted) (emphasis added)

The welfare of a child is certainly a legitimate state interest. See *Prince v. Massachusetts*, 321 U.S. 158 (1944).

The Attorney General of the State of New York respectfully submits that DRL §§ 111-111-a present a statutory framework wrought from careful legislative considerations. As previously discussed, the adoption process places the welfare of the illegitimate child above not only the rights of the putative father, but, even the natural mother.

The classification of the putative father bears a significant relationship to the purpose of the statute. It is the illegitimate child who is the primary beneficiary of the adoption process. The putative father is afforded notice and an opportunity to make his case at a hearing in which the best interests of the child are the guiding standard.

Amicus, Community Action for Legal Services, finds it all too easy to state that the Court of Appeals in *Malpica-Orsini* based its discussion on conjecture. Much to the contrary, Legal Services brief is replete with conjecture, confusing attempts at juxtaposition and a failure to point out that even Judge Jones, dissenting in *Malpica*, 36 NY2d at 585, stated that New York has a "compelling state interest" in the care and well-being of all its children.

Assuming, *arguendo*, this Court were to use the most stringent of judicial scrutiny it is evident that the State's interest is compelling and there is no less burdensome means of accommodating the putative father. Again, the Attorney General stresses the import of this legislation aimed at the welfare of the child not a father who has presently entered his third familial relationship, does not express care about the well-being of the two children of his

first relationship, See Statement of the Case, and contributed a meager \$30.00 a week, while he was so disposed of such generosity, to Maria, David, Denise and himself.

As this Court stated in *Smith v. O.F.F.E.R.*, 431 U.S. 816, 843 (1977), ". . . biological relationships are not exclusive determination of the existence of a family." The hearing required under DRL §§ 111-111-a is appropriate to the nature of this case. *Smith v. O.F.F.E.R.*, *supra*, 431 U.S. 816, 830. Arbitrariness which Amicus contends is present in the judge's mind is an insufficient contention. The very basis of the adoption process emanates from a knowingly assumed contractual relation with the State. It becomes all too easy for a discontented participant to this process to raise such an unfounded argument. Without DRL §§ 111-111-a the child is made a pawn in embittered and sometimes avariciously motivated custody proceedings not to mention the diminished chances of the child finding equal rights in a secure home upon the adoption by the natural mother and her husband. See: *Jiminez v. Weinberger*, 417 U.S. 628.

Stanley v. Illinois does not indicate any flaw in DRL §§ 111 and 111-a as appellant urges. New York makes no statutory presumption of unfitness of the putative father. The New York statute, as the Georgia statute held constitutional in *Quilloin v. Walcott*, affords the putative father due process of law, see Point I, *supra*, and in so doing secures for him equal protection under the laws which he has a right to invoke to protect his interests. It must be reiterated, however, that the putative father's rights in the instant proceeding are not equal to or above the rights of his alleged illegitimate children. The legislature of the State of New York was primarily motivated by concern for the welfare of the child. DRL § 111-a is a rational legislative allocation of rights between the natural mother and the putative father. Certainly DRL §§ 111-111-a are in keeping with this Court's paramount concern for the child's welfare and the legislation is justified under the equal protection clause.

POINT III

Equal protection guarantees do not mandate the natural mother and putative father to be in the same jural relationship to the children.

The classification of the appellant, putative father, is not a semantic distinction. Rather the classification is one undeniably based in sociological and biological reasoning (See discussion *Malpica-Orsini*, *supra*, Point II) enabling the legislature of the State of New York to enact legislation more in tune with promoting the welfare of the child. No intention or motive can be found, or has been offered by appellant, on the part of the legislature to single out appellant solely on the basis of sex. Any argument advanced by appellant that the classification is invidious is without foundation in practicalities.

Furthermore, this Court has not adopted the principle that sex is a suspect classification. Indeed, this Court's holding in *Reed v. Reed*, 404 U.S. 71 (1971) that gender-based distinctions are not inherently suspect, requiring that they merely be tested by the standard of rational relationship, has not been overruled. See, e.g. *Craig v. Boren*, 429 U.S. 190 (1976); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Califano v. Webster*, 430 U.S. 313 (1977); Cf. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

As this Court stated in *Trimble v. Gordon*, 430 U.S. 770, there are numerous reasons for setting varying criteria when the rights of the natural mother and the alleged putative father come into conflict.

The adoption process operates as a matter of public policy, independent of blood ties. The statutory framework upon which it rests is founded upon benefiting the children and finding a true home for them.

Family breakdown and illegitimacy are important concerns of the legislature in attempting to promote the welfare of the children. The State of New York has im-

plemented an adoption process which operates smoothly and efficiently and has, as its primary beneficiary, the interests of the children at heart.

To require the consent of putative fathers, or some of them, would have deleterious effects on the very process itself and continue to visit the stigma of illegitimacy on the children.

The legislature took reasoned cognizance of the sociological realities that the children born out of wedlock normally reside with the natural mother after birth. And the legislature can properly accord great weight to the biological fact that in almost all cases the State can ascertain the true identity of the natural mother. This is opposed to the serious problematic practicalities of ascertaining the identity of the putative father.

The legislature realized that paternity suits are more often than not instituted by the natural mother and the legislature went even further to consider the possibilities of blackmail or avariciously motivated litigation by the putative father.

In summary, the Attorney General has found no case in which this Court has held that sex is a suspect classification and therefore must subject the State to a test under which compelling interests are served by the classification.

Rather, the appropriate standard for this Court to consider is whether the classification embodied in DRL §§ 111-111-a bears a rational relationship to the object of the legislation.

The object of the legislation before this Court is the welfare of the children. The classification of the putative father reflects a legislative allocation of rights amongst many parties to the adoption. Certainly, the considerations aforementioned demonstrate that the classification is reasonable, not arbitrary, and in keeping with this Court's paramount concern for the well-being of the children. *Quilloin v. Walcott, supra.*

POINT IV

The judgment of the New York State Court of Appeals should be affirmed.

Dated: New York, New York
July 24, 1978

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
*Attorney Pro Se for the
Constitutionality of
DRL § 111-111-a*

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

IRWIN M. STRUM
Assistant Attorney General
in charge of Trusts and
Estates Bureau

WARREN M. GOIDEL
Assistant Attorney General
in charge of Charitable
Foundations Bureau

NEIL S. SOLON
Assistant Attorney General
of Counsel